BEST AVAILABLE COPY

No. 85-153

Supreme Court, U.S.
FILED
SEP 6 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

BALTIMORE GAS AND ELECTRIC COMPANY
AND BGE CORP,

Petitioners,

v.

FRANK O. HEINTZ, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RESPONDENTS' MEMORANDUM OPPOSING CERTIORARI

OF COUNSEL:

EUGENE GRESSMAN,
University of North Carolina
School of Law,
Chapel Hill, N.C. 27514,
(919) 962-4120,

KIRK J. EMGE,*
Public Service Commission
of Maryland,
231 East Baltimore Street,
Baltimore, Maryland 21202,
(301) 659-6011,
Counsel for Respondents.

*Counsel of Record

The Daily Record Co., Baltimore, MD 21202

QUESTION PRESENTED

Whether Section 24(e) of Article 78, *Annotated Code of Maryland,* as applied to prohibit a Maryland stock corporation from holding more than 10% of the total capital stock of a Maryland public utility company, is consistent with the Commerce Clause of the United States Constitution.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
I. This case presents no occasion to re-examine or clarify modern Commerce Clause jurisprudence	2
II. The decision below correctly applies the *Pike v. Bruce Church* balancing test	5
III. There are no conflicting decisions respecting the validity of state statutes relating to holding company control of local utility companies	8
CONCLUSION	9

TABLE OF CITATIONS

Cases

Arkansas Electric Coop. v. Arkansas Public Service Comm., 461 U.S. 375 (1983)	2-3, 4, 5
Edgar v. MITE Corp., 457 U.S. 624 (1982)	4, 5, 7
Illinois Gas Co. v. Public Service Co., 314 U.S. 498 (1942)	5
Kassel v. Consolidated Freightways Corp., 450 U.S. 662 (1981)	2
New England Power Co. v. New Hampshire, 455 U.S. 331 (1982)	3
Philadelphia v. New Jersey, 437 U.S. 617 (1978)	3
Pike v. Bruce Church, 397 U.S. 137 (1970)	4, 5, 6, 7, 8

No. 85-153

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

BALTIMORE GAS AND ELECTRIC COMPANY
AND BGE CORP,

Petitioners,

V.

FRANK O. HEINTZ, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RESPONDENTS' MEMORANDUM OPPOSING CERTIORARI

This memorandum is filed on behalf of the Respondents Frank O. Heintz, William A. Badger, Lilo K. Schifter, Wayne B. Hamilton, and Haskell N. Arnold, who constituted the Public Service Commission of Maryland at the time suit was filed, as well as on behalf of the Respondent Maryland People's Counsel.

The respondents oppose the grant of certiorari. Petitioners have not satisfied any of the certiorari considerations set forth in Rule 17.1. The Fourth Circuit's decision is not alleged to be in conflict with the decision of any other federal court of appeals; nor has the Fourth Circuit decided an important question of constitutional law which has not been, but should be, settled by this Court, or in any way "in conflict with applicable decisions of this Court."

I.

THIS CASE PRESENTS NO OCCASION TO REEXAMINE OR CLARIFY MODERN COMMERCE CLAUSE JURISPRUDENCE.

Petitioners seek (Pet. 8-12) to exploit the Fourth Circuit's declination to resolve what it called the "quandary" as to whether this Court "has abandoned *completely* the distinction between direct and indirect burdens on interstate commerce for purposes of commerce clause analysis" (Pet. App. 20a, emphasis added). Petitioners also refer to Justice Rehnquist's statement that "the jurisprudence of the 'negative side' of the Commerce Clause remains hopelessly confused." *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 706 (1981) (Rehnquist, J., dissenting).

But the Fourth Circuit was quite correct in declining to engage in a wholesale review of Commerce Clause jurisprudence. Nor is there any need for this Court to grant certiorari to determine if the "direct/indirect" test has been abandoned totally and in all contexts of state regulation. What Petitioners ignore is the fact that we are dealing here solely with the test to be applied in assessing the constitutionality of state regulation of public utilities, a kind of regulation described by this Court as "one of the most important of the functions traditionally associated with the police power of the States." *Arkansas Electric*

Coop. v. Arkansas Public Service Comm., 461 U.S. 375, 377 (1983).

The Fourth Circuit has done no more than recognize, as this Court has done, that it is very difficult, anachronistic and overly-mechanical to use the "direct/indirect" formula as "the sole standard" (*Arkansas,* at 393) by which to engage in "constitutional review of state utility regulation" (*Arkansas,* at 391). Neither this Court nor the Fourth Circuit has said that the "direct/indirect" test is worthless in all Commerce Clause jurisprudence, including all areas of public utility regulation. There are instances where a direct and discriminatory burden on commerce will alone be enough to render a state regulation invalid *per se*. E.g., *New England Power Co. v. New Hampshire,* 455 U.S. 331, 339 (1982); *Philadelphia v. New Jersey,* 437 U.S. 617, 624 (1978). But this is not one of those instances, for the regulation here is concededly evenhanded and nondiscriminatory. The decision below thus reflects the sensible attitude of the *Arkansas* decision that the direct burden formulation should not be "the sole standard" used when a public utility regulation is evenhanded and when use of the formulation produces an anachronistic constitutional result.

Exclusive reliance on the direct burden test in this case to assess the validity of Maryland's Section 24(e) would produce a result at odds with the historic power of the states to regulate local public utilities. Most aspects of local utilities, including their corporate structures and the transmission of their products, have substantial interstate dimensions. There are few kinds of state controls over such enterprises that do not create some kind or degree of direct or indirect burden on interstate commerce. For example, as the Fourth Circuit noted (Pet. App. 21a), Maryland's rules respecting the formation of public utility holding companies burden commerce in the sense of

limiting a local utility's ability to consummate interstate stock transactions, as well as the ability of out-of-state shareholders to exchange their shares through the channels of commerce. By the same token, the regulations in the *Arkansas* case respecting the wholesale electricity rates chargeable by a local electric cooperative certainly had a direct impact upon the interstate transmission of electricity. If such impacts were "the sole standard" for assessing the constitutionality of public utility regulations, the states would be stripped of virtually all police power to regulate local utility enterprises. Such a result is too anachronistic, too intrusive upon the police powers of the states.

Petitioners also refer to Justice White's plurality opinion in *Edgar v. MITE Corp.*, 457 U.S. 624, 640-643 (1982), wherein state anti-takeover legislation was invalidated because of its "direct restraint on interstate commerce." But that opinion did not attempt to use the direct restraint formulation as "the sole standard" for assessing validity; the opinion found that the Illinois anti-takeover statute "is also unconstitutional under the [balancing] test of *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970)." 457 U.S. at 643. In any event, the state interests at stake in *MITE* were "sweeping" in their extraterritorial effect and addressed quite different concerns than those brought into focus by Maryland's Section 24(e). In no sense can *MITE*'s use of the direct restraint test be considered at war with the balancing test articulated in *Pike* and applied in the public utility regulation context in *Arkansas*. The lines of distinction between the two formulations are clear. They need no further clarification.

While reaching different results, both the District Court below (Pet. App. 43a-44a) and the Fourth Circuit (Pet. App. 20a-23a) premised their decisions on the *Pike* balancing equation, having expressly rejected the use of

the direct burden test in the setting of public utility regulation. The lower courts are not confused about the proper test to be used. They are obedient to the balancing test as adapted for public utility regulation cases by the *Arkansas* decision of this Court, a test finding its origin not only in the *Pike* ruling but in *Illinois Gas Co. v. Public Service Co.*, 314 U.S. 498, 505 (1942). In *Illinois Gas* this Court announced that, when dealing with public utility regulation matters, courts should eschew mechanical or simplistic tests of validity and look instead "to the nature of the state regulation involved, the objective of the state, and the effect of the regulation upon the national interest in the commerce."

II.

THE DECISION BELOW CORRECTLY APPLIES THE *PIKE V. BRUCE CHURCH* BALANCING TEST.

Petitioners assert (Pet. 12-16) that the Fourth Circuit misapplied what is termed "the indirect burden analysis of *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970), on which the majority opinion in *Edgar* [v. *MITE Corp.]* was based."[1] That claim is without merit. The Fourth Circuit's treatment and application of the *Pike* balancing test are eminently correct and need no further review.

(a) Petitioners do not challenge the Fourth Circuit's ruling (Pet. App. 23a) that Section 24(e) "regulates

[1] *Pike* phrases the criteria for determining the validity of state statutes affecting interstate commerce as follows: "Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." 397 U.S. at 142.

evenhandedly and is thus subject to the *Pike* balancing approach [since the] statute, in neither design nor effect, discriminates in favor of local commerce or against out-of-state commerce." The District Court ruled to the same effect, finding that "economic protectionism is not an issue" (Pet. App. 44a). The essential predicate for applying the *Pike* balancing test has been satisfied.

(b) Nor do Petitioners protest the Fourth Circuit's determination (Pet. App. 26a-27a) that the state interest protected by Section 24(e) is legitimate. Section 24(e)'s regulation of the corporate structure of local utility companies was deemed to be a "necessary adjunct to ensuring the protection of consumers." Pet. App. 27a. To the same effect is the District Court's qualified finding (Pet. App. 40a) "that the state has a legitimate interest, expressed through Section 24(e), in controlling the formation of utility holding companies."

(c) Petitioners do assert (Pet. 13-15), however, that the Fourth Circuit erred in failing to hold (see Pet. App. 31a) that certain so-called "arbitrary and irrational classifications and exceptions" (Pet. 13), respecting the Section 24(e) ban on holdings of more than 10% of an operating utility's stock, undermines the state's interest in protecting utility consumers. The "classifications and exceptions" to which Petitioners object relate to certain types of holding companies that may, with the approval of the Public Service Commission, acquire more than 10% of local utility stock. The answer to that objection is simple. As the Fourth Circuit said (Pet. App. 31a), the state interest is adequately maintained by a statutory scheme that prohibits certain acquisitions of more than 10% while permitting other such acquisitions if the Commission is satisfied that the interests of consumers are not thereby compromised. The Fourth Circuit's holding, limited as it is to the peculiarities of Section 24(e), presents no ruling of

national significance. Nothing that this Court said in *Edgar v. MITE Corp.*, 457 U.S. at 644, about an inconsistent state objective in the Illinois anti-takeover statute bears upon the legitimacy of the state interest embodied in Maryland's Section 24(e).

(d) Finally, Petitioners assert (Pet. 15-16) that the Fourth Circuit misapplied the last component of the *Pike* balancing test, *i.e.*, that the burden on commerce that will be tolerated depends in part on whether the local interest involved "could be promoted as well with a lesser impact on interstate activities." Petitioners' claim is that a system by which Commission approval would be required for all acquisitions in excess of 10% of a local utility's stock would have a lesser impact on commerce than an outright ban on certain acquisitions in excess of 10%. The Fourth Circuit gave the correct answer to this assertion (Pet. App. 32a):

> When as in this case, however, the challenged statute does not discriminate against interstate commerce but regulates evenhandedly, the court does not inquire strictly into whether alternate nondiscriminatory means of protecting the state interest are available. *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979); *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 353 (1977). The choice among nondiscriminatory alternatives is a decision to be made by the state legislature. So long as the alternative chosen by the state does not discriminate against out of state commerce, then the court will not find the state's selection to be an unconstitutional burden on interstate commerce because other equally nondiscriminatory means of achieving the state's purpose exist.

There is no need to grant certiorari merely to affirm that correct observation.

In short, the Fourth Circuit has correctly applied the *Pike* balancing considerations in sustaining the constitutionality of Maryland's Section 24(e).

III.

THERE ARE NO CONFLICTING DECISIONS RESPECTING THE VALIDITY OF STATE STATUTES RELATING TO HOLDING COMPANY CONTROL OF LOCAL UTILITY COMPANIES.

Petitioners, in an effort to elevate this case into one of national importance, collect statutes from 28 states that are said to regulate the sale of stock or other means of transferring control of public utilities. See Pet. 17-18, at n. 6. From which Petitioners draw the assertion that the Fourth Circuit's validation of Maryland's Section 24(e) "may be used as a precedent for the constitutionality of any [of these 28 state statutes] . . . [and] is a clear precedent for the constitutionality of a state statute that would simply prohibit the formation of public utility holding companies and it could encourage other states to enact such laws." Pet. 17-18.

But the existence of 28 such statutes, without more, is not a ground for granting certiorari. Significantly, Petitioners cite no constitutional challenges to any of these other statutes, other than in the instant case. Nor do Petitioners cite any ruling invalidating any such statute under the Commerce Clause, a ruling that would be in conflict with that of the Fourth Circuit. There is no need for certiorari review under these circumstances.

It is noteworthy that Petitioners have abandoned in this Court the equal protection, due process and preemption assaults on Section 24(e) that they advanced without success in the lower courts. The Fourth Circuit found the equal protection and due process claims to be without merit (Pet. 12a-18a), while the District Court found it unnecessary to deal with them (Pet. App. 45a). Both the

Fourth Circuit (Pet. App. 8a-11a) and the District Court (Pet. App. 40a-43a) held that the Maryland provision is not preempted by the federal Public Utility Holding Company Act of 1935, a conclusion supported by the *amicus* brief of the Securities and Exchange Commission filed in the District Court.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

Of Counsel:

Eugene Gressman,
University of North Carolina
School of Law,
Chapel Hill, N.C. 27514,
(919) 962-4120,

Kirk J. Emge,*
Public Service Commission
of Maryland,
231 East Baltimore Street,
Baltimore, Maryland 21202,
(301) 659-6011,
Counsel for Respondents.

**Counsel of Record*